Reply Brief of Wilson & Warren

Petitioner.

# Supreme Court of the United States

October Term, 1897

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NO. 535

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

*Appellant,*

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,

*Appellee.*

## Reply Brief and Argument of Appellant

IN SUPPORT OF

## Petition for Writ of Certiorari.

BLUFORD WILSON AND
PHILIP BARTON WARREN,
*Solicitors for Petitioner.*

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It is unnecessary to follow counsel for the intervener in their not over courteous criticisms of the receiver's action in presuming to resist, to the court of last resort, their unskillful, inapt and totally inadequate petition.

In support of their one proposition that the receiver had no "appealable interest," they dwell upon what they term

> "The failure on the part of the receiver to comprehend the difference between *diminution of the estate* and *distribution of the assets of the estate.*"

The sufficient answer to this is found in the fact that the receiver is the receiver of the entire estate for the benefit of whom it may concern *in the order of equitable priorities.* So far as the bondholders are concerned, to pay an unsecured creditor out of a fund belonging to them, is just as much a diminution of their estate, as it would be to pay any other illegal and unjust claim against the estate.

It is not enough that an unsecured claim should be "just" as against the Company. It is indispensable and of the very essence of equity, in order to entitle it to preference over the mortgage debt, that all the equitable conditions entitling it to such preference, should not only be aptly alleged in the pleadings, but should also be established by competent evidence.

Especially is this true, when, as in the case at bar, it clearly appears upon the face of the record that the defendant railway company is insolvent and unable to pay its floating debt, and when it further affirmatively appears that the mortgaged property is an insufficient and inadequate security for the payment of the mortgage debt.

These facts are specifically averred in the bill of complaint filed by the Mercantile Trust Company, and are nowhere controverted;

> "X. And your orator further shows unto your Honors, that it is informed and believes that the said railway company is insolvent and unable to pay its floating debt and current, and presently accruing indebtedness."
>
> "XI. Your orator further shows, that the said mortgaged property is insufficient and inadequate security for the payment of the outstanding bonds secured by the said mortgage; that there is danger that the said property may be sold under judgments, and that the property and lines of said company may be separated and broken up, and the earning capacity destroyed or impaired by the contests of creditors for conflicting claims, *and the mortgaged premises wasted and depleted.*" (R. p. 6.)

It further appears that the relief prayed by the the trustee was that

> "The deed of trust may be decreed to be a lien upon all property mentioned and described therein, and upon all the property, real, personal or mixed; rights, franchises, lands, titles, railroads, branches, extensions; tolls, incomes, rents and issues of the said railway company, described in the said mortgage or trust deed, within the jurisdiction of this Honorable Court, and that the said railway company may be decreed to pay unto your orator and the other bondholders, under aforesaid mortgage or deed of trust, all arrears of interest now due, or that may hereafter become due and payable upon said bonds, together with all the costs and expenses in this behalf incurred and expended." (R. pp. 6 and 7.)

And the further prayer was that a receiver might be appointed in aid thereof, with directions to take possession of all the said mortgaged property for the benefit of the bondholders.

Thus, as we see, the bondholders claim a prior lien upon the entire estate, which is alleged to be an inadequate security for the payment of the mortgage debt. This being established upon the record, what possible difference can it make to the bondholders, whether an unsecured claim is legal or illegal, just or unjust? Unless facts are alleged and proved that take it out of the unsecured class, and entitle it to preference, the wrong to the bondholders from paying such unsecured claim is precisely the same as that which would result from paying an illegal claim.

*In all such cases the distribution of assets and the diminution of the estate, except in strict conformity to priorities, mean to the mortgage creditor the same thing.*

It follows, therefore, that the obligation resting, in this case, upon the intervener and pleader to show that his unsecured claim is equitably entitled to preference, is quite as imperative as is the obligation of the holder of any other claim, to establish by competent proof that his claim is legal.

If the receiver had such an interest as entitled him to defend, as to legality, before the master and before the Circuit Court, he had such an interest as entitled him to appeal on the question of priority, especially where the court granted him the right to so appeal. Any other conclusion would seem to be absurd, and amounts to a denial of justice to the mortgage creditors,

whose rights the receiver was appointed to conserve, and who had been lulled into quietude and inaction by the course of the intervener in litigating his claim against the receiver, as sole respondent, in all preliminary stages.

Up to the point of a favorable decree from the Circuit Court, the intervener was silent as to the right of the receiver to appear as sole respondent and defend. The intervener made no objection to the receiver as a competent defender of the estate as long as he was having things his own way. If the receiver had no appealable interest, the intervener was presumed to have known that before the appeal was taken, and it would have been more consistent with fair fighting if he had made the objection at the start. Somebody certainly had the right to resist the claim and to appeal from an adverse decision. It is conceded that the trustee for the bondholders or the company, up to the date of foreclosure and sale, and the purchasers after sale, had such right.

Can it be said that the receiver did not represent them?

In point of fact the record shows that the Mercantile Trust Company of New York, trustee and complainant in the cause, and C. H. Bosworth, the receiver therein, was represented by the same counsel. The intervener recognized this fact in the very decree drawn

by his counsel and entered by the Circuit Court allowing the claim. (R. p. 31)

It also appears that the Mercantile Trust Company, as trustee, from the very first, objected to the allowance of "six month's claims," including traffic balances. (R. p. 25) The inference is, therefore, conclusive that the mortgage creditors were not indifferent parties in the litigation as between the receiver and the intervener, but, through the receiver, were strenuously resisting the allowance of this claim from start to finish.

It also fully appears upon our original brief that all of the litigation affecting the rights of the mortgage creditors and in opposition to the allowance of the so-called preferential or "six month's claims" was made in behalf of the mortgage creditors, in the name of the receiver, and by the same counsel, and that prior to this case, no question about the receiver's right to appeal in all such cases had ever been raised either in the Circuit Court or in the United States Circuit Court of Appeals for the Seventh Circuit.

Only four federal decisions, on the question, are reported. The Fourth and Sixth Appellate Circuits and the Supreme Court, as we have seen, sustain the right of appeal. The Seventh Circuit alone denies it.

The petition of the intervener sets up an unsecured debt of the company, and prays that it may be allowed and paid by the receiver under the terms of the

merely interlocutory order appointing him. Upon its face the petition made no such case as entitled the intervener to priority over the mortgaged estate, to conserve which the receiver had been appointed. Both in practice and upon precedent, as shown in our original brief, the order appointing the receiver invested the holders of "six month's claims" with no conclusive right to payment.

As to matters of practice it would seem to be enough in all the more important steps, and especially in matters of appeal, that the receiver should have the approval and be backed by the authority of the court which appointed him.

All such acts are necessarily performed under the immediate supervision of the appointing power.

In all his acts, the receiver is continually confronted with the danger of removal for misconduct or breach of duty. This is a sufficient restraint upon excess of zeal and the litigious spirit. It should also be, and doubtless is a sufficient assurance to parties litigant against "vexatious litigation at the expense of the estate," or improper interference in litigation.

As the custodian of the estate and its income, the receiver is necessarily brought into the closest contact with all litigation looking to the application of the income and the distribution of assets. He is nearly always a party and often the sole respondent. Even

after sale both estate and income remain in the custody of the receiver frequently for weeks and months. For the payment of claims and debts, purchasing bondholders often reinforce the income by cash advances. The right to sue and be sued is one of the ordinary powers of the receiver. The right of appeal is a necessary incident and corollary, and the only limitation upon the exercise of the right should be that imposed by the good sense of the receiver and the sound discretion of the chancellor charged with the general administration of the trust.

Respectfully submitted,

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